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Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 1262.

JAMES CRAWFORD and WILLIAM A. HARRINGTON, Partners under the Firm-name of CRAWFORD & HARRINGTON, and GEORGE A. MEIGS,
Plaintiffs in Error,

vs.

GRANVILLE O. HALLER.

Motion to Dismiss, with which is joined a Motion to Affirm under Rule 6.

JOHN H. MITCHELL,
Counsel for Defendant in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

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vs.

GRANVILLE O. HALLER.

Comes now the defendant in error, Granville O. Haller, and moves the court to dismiss the writ of error in this cause for want of jurisdiction, because the judgment of the Supreme Court of Washington Territory, to which said writ of error was directed, is not a final judgment, and because there is no assignment of errors, as required by section 997 of the U. S. Revised Statutes and par. 4 of Rule 21 of this court, and for the reasons more fully stated in accompanying brief; or, if the writ of error shall not be dismissed, that the judgment of the said Supreme Court be affirmed with damages, on the ground that, although in the opinion of this court the record may show that this court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument. This under Rule 6, and for reasons more fully stated in accompanying brief.

JOHN H. MITCHELL,
Counsel for Defendant in Error for the purposes of these motions.

NOTICE TO PLAINTIFFS IN ERROR.

To S. S. BURDETT, esq.,
Counsel for Plaintiffs in Error.

Please take notice that on Monday, the 21st day of April, A. D. 1884, at 12 o'clock m., the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the court thereon. Annexed hereto is a copy of my brief in support of said motions.

JOHN H. MITCHELL,
Counsel for Defendant in Error for the purposes of these motions.

BRIEF ON MOTIONS.

This is an action at law, and was brought by Granville O. Haller, the defendant in error, against the plaintiffs in error, in the District Court of the third judicial district of Washington Territory, to recover damages on account of the violation on the part of plaintiffs in error of the terms and conditions of a written contract of date September 3d, A. D. 1880, whereby plaintiffs in error purchased from Haller and another—his assignor—certain merchantable saw logs amounting to some 2,120,813 feet, and agreed to furnish chains for booming the same, tow the booms, &c., &c. (Written Transcript, 4–12.)

Issues of fact were joined and the cause tried before a jury, which on the 31st day of October, A. D. 1882, rendered a money verdict in favor of Haller, plaintiff in the court below, against the present plaintiffs in error, for the sum of $15,248.01. (Written Transcript, 57.)

On November 3d, A. D. 1882, the District Court of the Territory rendered judgment on the said verdict for the full amount thereof.

After several continuances a bill of exceptions was made out, informally and illegally, however, as it is claimed by the defendant in error, and as will be shown in argument of motion to affirm, and an attempt was finally made on the part of plaintiffs in error to remove the cause to the Supreme Court of the Territory by writ of error.

The said cause was subsequently docketed in the Supreme Court, to wit, on the 27th day of June, A. D. 1883, and a transcript of the case was *then* filed in said Supreme Court.

On July 11th, A. D. 1883, the defendant in error, Haller, filed in the Supreme Court of Washington Territory a motion to dismiss said pretended writ of error, which motion was in words and figures as follows:

MOTION TO DISMISS WRIT OF ERROR.

Now comes the defendant in error by his attorneys, and appearing in the Supreme Court specially for the purpose of this motion, and for no other, moves the court to quash and dismiss the pretended suit of error in this cause for the reasons:

1st. That it does not appear from the record in this cause that any notice of writ of error was ever served upon said defendant in error, or any of his attorneys.

Waterman & Katz *v.* Arthur Phinney, 1 Washington Territory Reports, page 415.

2d. That it does not appear therefrom that any notice of writ of error was ever filed with the clerk of the court in which the judgment appealed from was entered.

Code of Washington Territory, sec. 458.

3d. That it does not appear therefrom that said notice was duly filed, or filed at all before service.

Code of Washington Territory, sec. 458.
Boston *v.* Haynes, 31 vol. California Reports, 107.
Buffendean *v.* Edmonson, 24 California Reports, 94.

4th. That said notice of writ of error does not contain a particular description of the errors assigned.

Code of Washington Territory, sec. 458.
McAlmond *v.* Adams, 1 Wash'n Ter. Rep., 230.

5th. That said plaintiffs in error have failed to file a transcript and have said cause docketed fifteen days before the first day of the approaching term of this Supreme Court.

Code of Washington Territory, secs. 460, 461.

G. MORRIS HALLER and
MCNAUGHT, FERRY, MCNAUGHT,
and MITCHELL,
Att'ys for Defendant in Error.

(Written Transcript, 187, 188.)

July 24th, 1883, the Supreme Court of the Territory, after argument, entered an order granting said motion to dismiss, and dismissing the writ of error in said cause, which order was in the following words: (See Written Transcript, 189, 191.)

ORDER OF SUPREME COURT OF TERRITORY DISMISSING WRIT OF ERROR.

TUESDAY, *July 24th*, 1883.

James Crawford and William A. Harrington, partners doing business under the firm name of Crawford and Harrington, and George A Meigs, plaintiffs in error,
vs.
Granville O. Haller, defendant in error. } Judgment.

Now, on the 11th day of July, 1883, this cause coming on to be heard upon the transcript filed herein on the 27th day of June, 1883, and the special motion of defendant in error, taken and plainly stated in his printed brief filed herein, to dismiss the above suit in error in this cause for the reasons therein stated; and after argument of counsel

by the respective parties, and due deliberation of the court, the court being fully advised in the premises, and it appearing that said motion should be sustained, and the said appeal and suit in error should be dismissed: Now come the plaintiffs in error, by their attorneys, and ask the court that they may have until Wednesday, the 18th of July, 1883, to obtain and file proof that a notice of suit in error had been filed with the clerk of the court in which the judgment or order appealed from was entered, and to show cause why said transcript had not been filed in this court and the cause docketed at least fifteen days before the first day of this term of court; which motion and time is accordingly granted. And now, on this 24th day of July, 1883, the said special motion having come on again for argument, and after hearing the argument of the attorneys for the respective parties, and the court being fully advised in the premises, and it appearing that said suit in error and appeal should be dismissed, it is therefore considered and adjudged that the appeal and suit in error in this cause be, and the same is hereby, dismissed, and that the said defendant in error, Granville O. Haller, do have and recover of and from the said plaintiffs in error, James Crawford, William A. Harrington, and George A. Meigs, or either of them, his costs in this court herein, taxed at forty-seven and 55-100 dollars, and that execution issue therefor.

To which ruling and decision of the court plaintiffs in error, by their attorneys, then and there except, and their exceptions are allowed by the court; and, on motion of said plaintiffs in error, a writ of error to the Supreme Court of the United States of America from said ruling and decision, and from the foregoing judgment of the court, is by the court allowed; and the said plaintiffs in error are allowed until the 6th day of August, 1883, within which to file a supersedeas bond, and prepare, settle, and file their bill of exceptions in this cause.

(Endorsed:) No. 363. Judgment entry. Entered and filed July 24, 1884. R. G. O'Brien, clerk.

(See Transcript, 189–191.)

From this order of dismissal the case is now here on a writ of error from this court, to the Supreme Court of the Territory, and the first motion of the defendant in error is to dismiss this writ for want of jurisdiction.

4th. That said notice of writ of error does not contain a particular description of the errors assigned.

Code of Washington Territory, sec. 458.
McAlmond *v.* Adams, 1 Wash'n Ter. Rep., 230.

5th. That said plaintiffs in error have failed to file a transcript and have said cause docketed fifteen days before the first day of the approaching term of this Supreme Court.

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by the respective parties, and due deliberation of the court, the court being fully advised in the premises, and it appearing that said motion should be sustained, and the said appeal and suit in error should be dismissed: Now come the plaintiffs in error, by their attorneys, and ask the court that they may have until Wednesday, the 18th of July, 1883, to obtain and file proof that a notice of suit in error had been filed with the clerk of the court in which the judgment or order appealed from was entered, and to show cause why said transcript had not been filed in this court and the cause docketed at least fifteen days before the first day of this term of court; which motion and time is accordingly granted. And now, on this 24th day of July, 1883, the said special motion having come on again for argument, and after hearing the argument of the attorneys for the respective parties, and the court being fully advised in the premises, and it appearing that said suit in error and appeal should be dismissed, it is therefore considered and adjudged that the appeal and suit in error in this cause be, and the same is hereby, dismissed, and that the said defendant in error, Granville O. Haller, do have and recover of and from the said plaintiffs in error, James Crawford, William A. Harrington, and George A. Meigs, or either of them, his costs in this court herein, taxed at forty-seven and 55-100 dollars, and that execution issue therefor.

To which ruling and decision of the court plaintiffs in error, by their attorneys, then and there except, and their exceptions are allowed by the court; and, on motion of said plaintiffs in error, a writ of error to the Supreme Court of the United States of America from said ruling and decision, and from the foregoing judgment of the court, is by the court allowed; and the said plaintiffs in error are allowed until the 6th day of August, 1883, within which to file a supersedeas bond, and prepare, settle, and file their bill of exceptions in this cause.

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MOTION TO DISMISS.

No bill of exceptions was signed or prepared in the Supreme Court of the Territory, nor was there annexed to, or returned with, the writ of error any assignments of errors, as required by section 997, U. S. Revised Statutes, and by paragraph 4 of Rule 21 of this court.

The naked question presented by the motion to *dismiss* the writ of error, is simply this:

Is the order or judgment of the Supreme Court of the Territory, dismissing the writ of error to the District Court, such a *final judgment* as can be reviewed on error in this court? The question as to the *correctness* of that decision will be considered later in discussing the motion to *affirm*.

It is respectfully submitted that the order or judgment of the Supreme Court of Washington Territory dismissing said writ of error is not such a *final decision*, within the meaning of section 1911 of the U. S. Revised Statutes, as can be reviewed in this court on writ of error. (Act March 2, 1853.)

King *v.* The Justices of Gloucestershire, 1 Barnewell & Adolphus, 1.
1 Chitty's General Practice, 736.
Marbury *v.* Madison, 1 Cranch, 175.
Ex-parte Bradstreet, 7 Peters, 647.
Hendoll *v.* The United States, 12 Peters, 622.
Ex-parte Newman, 14 Wall., 165.
Insurance Company *v.* Comstock, 16 Wall., 270.
Railroad Company *v.* Wiswell, 23 Wall., 507.

The plaintiffs in error have mistaken their remedy. It is by *mandamus* only, and not by *writ of error*, that the alleged error of the Supreme Court of the Territory can be considered and corrected in this court. (See authorities *supra*.)

Prior to the passage of the act of March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," (Supplement to the R. S., vol. 1, 173, 18; U. S. Stat., 472,) this was the well-settled doctrine in this court, as applicable to the *circuit courts* in all classes of cases.

In the case of the Insurance Company *vs.* Comstock, 16 Wall., 270, *supra*, this court—opinion by the late Mr. Justice Clifford—said:

"* * * Applying these rules to the case before the court, and it is clear beyond doubt that the Circuit Court erred in dismissing the writ of error [the writ of error was from the U. S. Circuit Court to the U. S. District Court of the Northern District of Illinois] for want of jurisdiction, as it was the right of the excepting party to have the questions, if duly presented in the bill of exceptions, re-examined by the Circuit Court, which leaves nothing further open for decision, except the question what disposition shall be made of the case, and what direction, if any, shall be given to the subordinate court. Appellate courts under such circumstances do not determine the questions presented in the bill of exceptions filed in the District Court, as those questions have not been re-examined in the Circuit Court, and this court is not inclined to re-examine any such questions coming up from the District Court until they have *first* been passed upon by the *Circuit Court*. Consequently the question whether a writ of error will lie from this court to the Circuit Court to re-examine the rulings of the Circuit Court in a case removed into that court from the District Court, in such a case as the one under consideration, does not arise, as the record shows that the Circuit Court never passed upon the questions as to the correctness or incorrectness of the rulings of the District Court. Repeated decisions of this court have established the rule that this court has power to issue a mandamus in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a

pending cause. Power to issue the writ of mandamus to the Circuit Courts is exercised by this court to compel the Circuit Court to proceed to a *final judgment or decree* in a cause, in order that this court may exercise the jurisdiction of review given by law; and in the case of *Ex-parte* Bradstreet (7 Peters, 647) this court decided, Marshall, Chief Justice, giving the opinion of the court, that 'every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum of $2,000, and that the court in such case will issue the writ to a Circuit Court, or a District Court exercising Circuit Court powers, in a case where the subordinate court *had improperly dismissed the case*, requiring the court to reinstate the case, and to proceed to try and adjudge the issues between the parties.'

"Examined, as this case must be, in the light of these authorities, it is quite clear that the respondents, had they petitioned this court *for a mandamus*, instead of *suing out a writ of error*, would be entitled to a remedy in some one of the forms in which a remedy is granted in such a case. * * * *Mandamus being the proper remedy, error will not lie. Writ of error dismissed for want of jurisdiction.*"

So held this court in 1872.

At the October Term 1874 of this court, in the case of Railroad Company *vs.* Wiswell, 23d Wall., 507, on a motion to dismiss a writ of error to the Circuit court for the Southern District of Illinois, error from a decision of the Circuit Court remanding a cause to a State court, this court held as follows, opinion by Chief Justice Waite:

"The writ of error is dismissed upon the authority of Insurance Company *vs.* Comstock, 16 Wall., 270. The order of the Circuit Court remanding the cause to the State court is not a '*final judgment*' in the action, but a *refusal to hear and decide*. The remedy in such a case *is by mandamus to compel action*, and *not by writ of error to review what has been done.*"

Nor does the act of March 3d, 1875, (18 U. S. Stat., 472, *supra*,) relating to the jurisdiction of Circuit Courts, cut

any figure in this case, except to *confirm* the positions assumed by showing that in a certain *class of cases*, in certain *specified courts*, Congress has provided by *express provisions of statute* for a writ of error and appeal from an order of any Circuit Court dismissing a cause or remanding one, because such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties to such suit have been collusively made or joined. The last clause of section five of said act is as follows:

"But the order of said Circuit Court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

This act relates exclusively to orders and decisions of the *Circuit Courts* of the United States, and to a *certain class of cases* in said courts, and has no reference, of course, to Territorial courts. And the fact that Congress has provided for writs of error and appeal in *certain cases*, while saying that only "*final judgments* and *decrees*," or "*final decisions*," shall be reviewed in *other* cases, is a strong argument in favor of the motion to dismiss in this case.

What are the *suits*, the dismissal of which by a *Circuit Court*, under the 5th section of the act of March 3d, 1875, are, by the express provisions of that section, made "reviewable by the Supreme Court on writ of error or appeal, as the case may be"? They are those belonging to *two* classes only. First, "any suit *commenced* in a *Circuit Court*;" and second, any suit "*removed* from a *State court* to a *Circuit Court* of the United States." The section does not relate to or include the dismissal of suits that are not originally *commenced* in a Circuit Court, except as to suits commenced in a *State* court and *removed* to a *Circuit Court*; hence it does not include suits *commenced* in a United States *District Court* and removed by *writ of error* or *appeal* to a *Circuit Court*.

Again, it is only where the dismissal in the Circuit Court is on account of one or the other of *two distinct specified causes*, that the order of the Circuit Court dismissing or remanding a cause is, by the terms of section 5, act of March 3d, 1875, *supra*, reviewable in this court. These are, *first*, where the suit is dismissed because it has appeared to the satisfaction of the Circuit Court that such suit, so *commenced* in such court, or *removed* there from a *State* court, "does not really and substantially involve a *dispute or controversy properly within the jurisdiction of said Circuit Court;*" and, *second*, where it shall appear to the satisfaction of said Circuit Court "that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under said act."

Even could the act be held to apply to cases *not commenced* in the Circuit Court, nor removed there from a *State* court, and to include cases brought into the Circuit Court, or attempted to be brought there on writ of error or by appeal from the final decision of a *District Court of the United States*, any dismissal of such *writ of error*, or *appeal*, would *not*, under the provisions of the 5th section of the act of March 3d, 1875, be reviewable in this court, unless, indeed, such order or decision of the Circuit Court involved, *first*, not only (in case of a writ of error) a dismissal of such *writ*, but a dismissal *also* of the *suit of the plaintiff;* and, *second*, that such dismissal was *not* on the ground that the plaintiff in error—who may be either the plaintiff *or* defendant in the District Court—had failed to comply with the law in suing out and filing his writ of error, or docketing his cause, or any other ground, save and except *one* of the *two grounds* specified in the 5th section of the act, *supra*, and above quoted.

It is not, moreover, an order of dismissal of a *writ of error* or *appeal* by the Circuit Court that is reviewable here under

section 5, act March 3d, 1875, but the dismissal of the *suit*, the *original action* or *suit*, the *plaintiff's case;* as it is respectfully submitted the words "any suit *commenced in a Circuit Court*" cannot be construed to mean any suit brought there on writ of error or appeal from an inferior court, but must be held to embrace only those suits that are in the first instance *commenced* in the *Circuit Court*. In other words, that the clause cannot be construed to mean suits commenced in the Circuit Court *by writ of error or appeal from the District Court*.

The decisions of this court, therefore, in the case of Ayres *v.* Chicago, 101 U. S. 186, and Hailley *v.* San Francisco, which at first glance would seem to overrule the cases cited *supra*, can have no application to this case.

The original act of Washington Territory, March 2, 1853, 10 Stat. at Large, pp. 172–179, (sec. 1911 U. S. R. Stat.,) provides that—

"Writs of error and appeals from the *final decisions* of the Supreme Court of Washington Territory shall be allowed, and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States, &c. * * "

It is only from the *final decisions* writs of error and appeals are allowed; and it is submitted that the clause in the section just quoted, providing that such writs of error and appeal may be allowed and taken "in the *same manner* and under the *same regulations* as from the *Circuit Courts* of the United States," was not intended to define the *cases* in which, or the character of *orders* or *decisions* from which, writs of error or appeals would lie, by thereby including *all cases* and *all decisions* in the *Circuit Courts* from which

writs of error or appeals were *then*, (March 2, 1853, date of original act, or June 22, 1874, date of approval of R. Stat.,) or at any subsequent time, by future legislation, might be allowed; but this clause related rather to the *manner* of taking a writ of error or appeal; and instead of providing *in terms* how that should be done, it was provided that they should be taken in the *same manner* and under the *same regulations* as from decisions of the Circuit Courts. This view is confirmed by the fact that the same section—1911 U. S. Rev. Stat.—goes on to provide *specifically* the *cases* from the "*final decisions*" in which, by the Supreme Court of Washington Territory, writs of error and appeal shall be allowed and taken to this court. These are where the value of the property or the amount in controversy exceeds $2,000; in all cases where the Constitution of the United States, or a treaty thereof, or acts of Congress are brought in question.

(Sec. 1911 U. S. Rev. Stat.)

It follows, therefore, that the subsequent legislation of March 3d, 1875, relating to the jurisdiction of the *Circuit Courts* does not, in any possible view, provide for a writ of error or appeal from any order or decision of the Supreme Court of Washington Territory in any case the right to which did not exist *prior* to the passage of such act. In other words, that the fifth section of the act of March 3d, 1875, *supra*, has no reference or application to writs of error or appeals from the *final decisions* of the Supreme Court of Washington Territory.

In fact, it would almost seem an apology were necessary for consuming so much time in demonstrating a proposition so plainly evident from the plain reading of the two acts; but as it is only by invoking the aid of the act of March 3d, 1875, that jurisdiction of this writ of error can be maintained, it has been deemed not improper to say this much.

Decisions which rest in the discretion of the court cannot be reviewed by a higher court upon error.

Liter *v.* Green, 2 Wheaton, 306.
Silsby *v.* Foot, 14 How., 218.
Crandall *v.* Peeble, 1 Oregon, 226.

It is evident that under the statutes of Washington Territory the question as to whether the Supreme Court of that Territory will, in case the transcript is not filed and the case docketed in the Supreme Court fifteen days before the first day of the term, dismiss the writ, or on a showing made permit it to stand for hearing, is one resting in the *sound discretion of the court*, and a decision *either way* is not subject to review here.

The Civil Code of Washington upon this subject provides as follows:

"SEC. 460. The notice of appeal or suit in error must be served at least thirty days, and the cause filed and docketed *at least fifteen days before the first day of the next term of the Supreme Court*, or the same shall not then be tried unless by consent of parties. If the appeal or writ of error is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term."

While sections 492 and 493 of the same code are as follows:

"SEC. 492. When an appellant, or plaintiff in error, has no right, or further right to prosecute the appeal or writ of error, the appellee or defendant in error may move to dismiss; and if the grounds of the motion do not appear in the record, or by writing purporting to have been signed by the appellant or plaintiff in error and filed, they must be verified by defendant."

"SEC. 493. The appellee or defendant in error may, by answer filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal or writ of error improper, or destroy the right of appellant or

plaintiff in error further prosecuting the same, to which answer the appellant or plaintiff in error may file a reply, likewise verified by himself, his agent or attorney, and the questions of law or fact therein shall be determined by the court."

It is clear this court would no more review the decision of the Supreme Court of Washington Territory by which the question of law and facts arising in such an issue are determined, and resulting in the dismissal of a writ of error or appeal, than it would review the decision of a Circuit Court on a motion for a new trial, or on a judgment for nonsuit.

A writ of error will not lie upon a judgment of nonsuit.

Evans *v.* Philipps, 4 Wheaton, 73.
1 Hy. Black, 432.

Neither will a writ of error lie upon the refusal of the court below to grant a nonsuit or new trial.

Gelston *v.* Hoyt, 3 Wheat., 246.
Sparrow *v.* Strong, 3 Wall, 102.
Id., 4 Wall., 596.

But again, this writ of error should be dismissed, and motion is now here made for that purpose under par. 5 of Rule 21 of this court; because there is no assignment of errors, as required by Section 997 of the Revised Statutes and par. 4 of said Rule 21.

Without doubt the writ of error should be dismissed.

ARGUMENT ON MOTION TO AFFIRM.

Should it be held this court has jurisdiction, it is apparent from the whole record that said writ of error was taken for delay only, and the questions sought to be raised are so frivolous as not to need further argument, and the judgment should be affirmed with damages.

POINT I.

There is not annexed to or returned with the writ of error any assignment of errors, as required by section 997 of the U. S. Rev. Stats., and Rule 21, paragraphs 4 and 5, of this court.

POINT II.

No bill of exceptions accompanies the record, nor are there any errors apparent on the face of the record.

"Where there is no bill of exceptions and nothing upon which error can be assigned, the regular practice is to affirm the judgment, not to dismiss the case."

James *v.* Bank, 7 Wall., 692.

In the case *supra* the facts were these: The Bank of Mobile brought suit in the Circuit Court for Louisiana against one James on a bill of exchange. The record of the case contained nothing but the declaration, the plea of the general issue, the proof of protest of the bill of exchange endorsed by the defendant, and notice to him of non-payment, and judgment of the court in favor of the plaintiff. There was no bill of exceptions, and nothing upon which error could be assigned.

Chief Justice Chase, in delivering the opinion of the court, said:

"The regular course in cases of this description is *to affirm the judgments*. The appeal is regularly here and cannot be dismissed for want of jurisdiction; the motion to dismiss the writ of error must be denied."

In Loring *v.* Frue, 104 U. S. 224, this court—opinion by Mr. Justice Miller—said:

"When a case is heard in an appellate court on a writ of error, it is a principle equally well settled in law, and necessary in the administration of justice, that only such errors as are plainly made to appear can be grounds of reversal, and that every presumption consistent with the record is to be made in favor of the action of the inferior court."

It has been shown that on a motion to dismiss a writ of error in the Supreme Court of Washington Territory, affidavits may be filed by the moving party to show that the appellant either *never had any right* to his writ, or has *no further right to prosecute it*, and that the plaintiff in error may reply by affidavit, (Washington Code, section 492;) and that the court shall determine the issues thus raised; (Washington Code, section 493;) and yet no record of the issues thus made, if any, or of the facts contained in the affidavit of the defendant in error in support of his motion, has been presented to this court by bill of exceptions or otherwise.

The record should show by a bill of exceptions the proof made below and the decision of the court; a statement that the court below overruled a motion to dismiss the cause, and that the plaintiffs in error "reserved their exceptions to the decision," does not bring up any question.

Kearney *v.* Denn, 15 Wall., 51.

Upon a writ of error the court in error cannot inquire whether on the evidence the *facts* were rightly decided.

Tyler *v.* Angevine, 8 Reporter, 643.

"The Superior Court can only review the errors of the court below in matters of law appearing on the record. If the *facts* upon which the court pronounced their judgment do not appear on the record, it is impossible for this court to say that their judgment is erroneous in law."

Prentice *v.* Zane, 8 How., 470.

In the case under consideration, the *facts* only partially appear, and these mainly in the opinion of the Supreme Court given on dismissing the writ of error, and a copy of which accompanies the transcript in this case.

In Baltimore and Potomac R. R. Co. *v.* Trustees of Sixth Presbyterian Church, error to the Supreme Court of the District of Columbia, (91 U. S., 127,) this court said:

"* * * But it is equally true that if the transcript does not show that any error exists in the record, the judgment must in all cases be affirmed, except where it appears that there has been a mistrial. (Minor *v.* Tillotson, 1 How., 287; Taylor *v.* Martin, 2d Black, 484; Barnes *v.* Williams, 11 Wheaton, 415; Carrington *v.* Pratt, 18 How., 63.)"

POINT III.

The decision of the court below was *clearly right* upon the *record presented*, leaving no room for argument to the contrary.

The motion to dismiss, filed by the defendant in error in the Supreme Court of Washington Territory, has already been given in full in argument of motion to dismiss, *supra*, and is now cited and referred to in support of the motion to affirm.

The most satisfactory and conclusive reasons that can be given here in favor of the correctness of the decision of the court below are those contained in the opinion of Chief Justice Green, of the Supreme Court of Washington Territory, and which was concurred in by Associate Justices Hoyt and Wingard.

Before quoting this opinion, the following sections of the Civil Code of Washington Territory bearing upon the subject of writs of error and appeals from the final decisions of the District Courts to the Supreme Court of that Terri-

tory, and most of which are referred to, commented upon, and *construed*, but not quoted in full by the court in their opinion, will be set out in *hæc verbæ*, as follows:

CIVIL CODE OF WASHINGTON.

"SEC. 453. Appeals and writs of error from the District Court may be taken to the Supreme Court at any time within six months from the rendition of the judgment or order appealed from or complained of, and not afterward. But nothing herein contained shall prevent the district judge who tried the cause to make certificate that the cause involves the determination of a question of law, upon which it is desirable to have the opinion of the Supreme Court. In such cases said judge may direct a special verdict to be found, and in all cases the parties may make an agreed statement of facts, signed by themselves or their attorneys, which shall be entered of record, which shall have the effect of a special verdict, and may, under the direction of the judge of the District Court, be taken to the Supreme Court, and for that purpose the District Court shall render a judgment in form only, which shall not be granted until the final decision of the cause. The Supreme Court, on hearing such cases, may give judgment, or remand the cause for further proceedings in the District Court." (Page 113, Code of Washington.)

"SEC. 458. An appeal or writ of error is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney.

"Every notice of appeal or writ of error must be signed by the party taking the same, or his attorney of record, and must contain the title of the District Court in which the proceedings sought to be reviewed were had; the title of the cause as in the District Court; a particular description of the judgment, decree, or order sought to be reviewed, and in case of appeal, a particular description of every decision, ruling, order, or decree by which the appellant claims to have been aggrieved, and which he relies upon as ground for a reversal or modification of the judg-

ment, order, or decree, and in case of a writ of error, a particular description of the errors assigned."

"SEC. 459. An appeal shall not be perfected until the notice thereof has been served upon the adverse party or his attorney of record. Upon payment of his fees, the clerk shall forthwith transmit by mail, express, or messenger, not a party nor the attorney of a party, a transcript of the record in the cause, or so much thereof as the appellant or plaintiff in error, in writing, in the notice has directed, to which shall be appended copies of the notice of appeal and the supersedeas bond, if any."

"SEC. 460. The notice of appeal or suit in error must be served at least thirty days, and the cause filed and docketed *at least fifteen days before the first day of the next term of the Supreme Court*, or the same shall not then be tried unless by consent of parties. If the appeal or writ of error is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term."

"SEC. 461. If the appellant fails to file a transcript and have the cause docketed, as provided in the preceding section, the appellee or defendant in error may file a certified copy of the judgment or order appealed from, and of the noticed served, and, on motion, have the appeal or suit in error dismissed, or the judgment or order appealed from affirmed: *Provided*, That when the failure to file the transcript is owing to the fault or omission of the clerk of either the appellate or inferior court, or other circumstance over which the appellant has no control, the court shall not dismiss the cause, but shall fix such time for hearing the same as will insure a fair trial."

"SEC. 463. If the transcript has been sent up and errors have not been assigned in the notice, as hereinbefore required, the appellee or defendant in error may have the appeal or writ of error dismissed, or the judgment or order affirmed, unless good cause for the failure be shown by affidavit."

"SEC. 466. An appeal or writ of error shall not be dismissed for any informality or defect in the notice or the

service thereof, if from the transcript it can be reasonably understood that the adverse party has had sufficient notice of the pendency of the suit in error or appeal, and the notice recites the errors alleged or the order or judgment complained of with such certainty that his substantial right would not be prejudiced by the hearing of the cause.

"And the Supreme Court shall, upon reasonable terms, allow all amendments in matters of form, curative of such defects, to the end that substantial justice be secured to the parties."

The opinion of the Supreme Court of Washington Territory, on order dismissing writ of error to the District Court, is now given:

In the Supreme Court of Washington Territory, of the July term A. D. 1883.

James Crawford and William A. Harrington, partners as Crawford & Harrington, and George A. Meigs, plaintiffs in error,
vs.
Granville O. Haller, defendant in error.

OPINION.

The transcript in this cause was filed less than fifteen days before the term, and was unaccompanied by any authenticated copy of the notice of appeal. On account of a want of compliance, in these respects, with sections 459 and 460 of the code, appellee moved to dismiss the appeal. Hearing of this motion was continued, and meantime leave was given to appellants, by a day certain, to bring in a duly certified copy of the appeal notice, and to show themselves guiltless of inexcusable laches in not having the transcript filed sooner. Afterwards, on the set day, appellants filed the certified copy of notice, but failed and still fail to make the proposed showing. Very earnestly they contend that no showing is necessary. Each party, after full argument, submits the motion. Resort must be had to a number of sections of our code in order to determine intelligently the questions involved. Especially applicable and entirely decisive, to our mind,

are the various provisions of the code touching the taking of appeals and the curing of defects and informalities. Section 453 begins with a clause which fixes six months next after judgment as the period within which an appeal must be taken.

Putting the case at bar to a computation, we find that the six months had elapsed on the fourth day of last May, sixty six days before this term commenced. Embraced in section 458 is a clause which prescribed that an appeal shall be taken by filing, with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney.

Continuing the subject of taking an appeal, section 459 says that an appeal shall not be perfected until the notice has been served on the adverse party or his attorney of record, and then proceeds to provide that upon payment of his fees the clerk shall forthwith transmit a transcript of the record in the cause. The word forthwith, in this section 459, does not cast on the clerk any unreasonable instantaneousness of action, nor does it, together with the connected words, take from appellant the right nor relieve him from the duty of looking after and supervising or abridge his privilege of interrupting, the preparation of his transcript. Obviously, the intent of the language is, that the clerk shall, as quickly as may reasonably be consistent with the nature of the record, and appellant's actions and directions, send up the transcript. Failure of the transcript to reach this court speedily, even after payment of fees, is not to be imputed to negligence of the clerk until the presumption that he has acted as he ought to is fairly rebutted.

Passing to sections 460 and 461 we find the former enacting that the notice must be served at least thirty days and the cause docketed at least fifteen days before the first day of the next term of the Supreme Court, or the same shall not then be tried unless by the consent of parties; and the latter, that if the appellant fails to file a transcript and have the same docketed, as provided in the preceding section, the appellee may file a certified copy of the judgment or order appealed from and of the notice served, and on motion have the appeal dismissed, provided

that when the failure to file the transcript is owing to the fault or omission of the clerk of either the appellate or inferior court, or other circumstance over which the appellant has no control, the court shall not dismiss the cause, but shall fix such time for hearing the same as shall insure a fair trial.

Effect must be given to both these last two sections, and such that they shall not conflict. Referring to section 453 we see that a party to a judgment in the District Court has a full six months within which to decide whether he will appeal. Six months may expire, and consequently his decision to appeal may occur, when the time remaining before the next term of the Supreme Court is too short to admit of a service of notice and filing of transcript outside the periods limited in section 460, over the date of expiration of his statutory time for appeal, appellant has no control. No fault, therefore, could be attributed to him if the failure to file in time depended upon that date. Such a case and all other cases where, through any circumstance beyond his control, the statutory periods of section 460 may not have been observed, are met and provided for in that clause of the section which says that either of those periods failing, there shall be no trial at the return term unless by consent.

In section 460 provision is thus made for the rights of parties whenever tardiness or omission of service or filing has happened from some circumstance not under appellant's control or otherwise excusable, while in section 461 provision is made for the rights of the appellee in cases where such tardiness or omission is owing to any circumstance which was under appellant's control.

Section 461 manifestly contemplates that there shall be a dismissal under certain circumstances, and plainly intends that those circumstances shall be adjudged to exist where there is inexcusable negligence on the part of the appellant. Nothing of value in the way of interpretation or construction can, as we think, be got from gazing at the narrow literal purview of the first half of section 461.

Our opinion is that the question thence arising, whether or not there is a total omission or only a mere delay, is entirely a barren one. The legislature is here dealing with very grave interests that surely ought not and can-

not be intended to turn on a consideration which is not of the slightest practical importance. Great weight, no doubt, in construing this and the preceding sections should be given to the liberal provisions of our code, and particularly those of section 466 regarding defaults, defects, and informalities. On careful review of those provisions, however, it will be easily gathered that they are not meant in any case to shield a man from the consequences of his own inexcusable neglect. Our duty is to apply those provisions generously to aid all proper cases, but not to extend them to situations they were never meant to cover. Defendants below, appellants here, while showing no excuse whatever for their failure to file this transcript in time, would, were this motion denied, succeed in putting this appellee to an injurious election, either to argue this cause at this term without the full statutory time for preparation, or to have determination of his suit, and perhaps collection of his demand, postponed at least a year. Motion granted; appeal dismissed.

ROGER S. GREENE,
Chief Justice.

We concur:

JOHN P. HOYT,
S. C. WINGARD,
Associate Justices.

(Endorsed:) No. 363; Crawford and Harrington and George A. Meigs *v.* G. O. Haller; opinion; filed July 24th, 1883; R. G. O'Brien, clerk.

(Endorsed:) Supreme Court U. S.; 1883; October term, No. 1265; William A. Harrington & James Crawford et al., pl'ffs in error, *v.* Granville O. Haller; certified copy of opinion; office Supreme Court U. S.; filed Mar. 7, 1884; James H. McKenney, clerk.

Section 2113 of the Code of Washington, in fixing the terms of the Supreme Court of that Territory, provides as follows:

"The Supreme Court of the Territory shall be held at Olympia on the second Monday of July in each year."

A reference to the calendar of 1883 will show that the second Monday of July of that year was the 9th day of the month.

Fifteen days before the *first day* of said July term of the Supreme court would be June 25th. The transcript was not filed or cause docketed in this court until June 27th, two days too late.

Little else need be added to what is so well said in the opinion of the court in favor of the correctness of their order dismissing the writ of error.

The court will further observe, by reference to the order of the court below dismissing this writ of error, and quoted in full *supra* in argument of motion to dismiss, that on July 11th, 1883, at the request of the plaintiffs in error, the court suspended its decision and gave them until July 18th—a full week—within which to obtain and file proof that a notice of suit in error had been filed with the clerk of the court in which the judgment appealed from was entered, and to show cause why said transcript had not been filed in the Supreme Court of the Territory, and the cause docketed at least *fifteen days before the first day of that term of court.* And this further appears from the opinion just quoted; and it also is shown therefrom, that while on the 18th day of July, the day set, the plaintiffs in error filed the certified copy of notice, they *wholly failed to make the proper showing*, or, in fact, *any showing* to the effect that they were guiltless of inexcusable *laches* in not having the transcript filed and cause docketed sooner.

This showing they had a right to make, and it was their *duty* to make it under section 461 of the Washington Code heretofore quoted, *provided* always that the failure to file the transcript within the time was owing either "to the fault or omission of the clerk of either the appellate or

inferior court, or other circumstance over which the appellants had no control."

Had they been able to do this, and had they done it, as ample opportunity was given them by the court, then clearly the writ of error would not have been dismissed; but having wholly failed, it is clear they cannot be heard to assign error now.

But this whole case involves *only* a question as to the *proper construction of the local code of the Territory of Washington* in reference to the time and manner of taking appeals and writs of errors from decisions of the District to the Supreme Court of the Territory.

The rule, so well settled, that this court will follow the construction given to a State law by the highest court of a State—Moores *v.* National Bank, 104 U. S., 625; Tioga Railroad *v.* Blossburg and Corning R. R., 20 Wall., 137; Kibler *v.* ditto, 93 U. S., 674; Fairfield *v.* County of Gallatin, 100 U. S., 47—is applicable also to the highest court of a Territory.

In Sweeny *v.* Lomme, 22 Wall., 213, which was error to the Supreme Court of the Territory of Montana, this court (opinion by Mr. Justice Miller) followed the construction given by the Territorial Supreme Court to certain statutes of that Territory. The court said:

"The first error assigned and mainly relied on is that the bond on which the suit is brought having been given to the sheriff, this action cannot be maintained by Lomme, the party for whose benefit it was really given.

"This question has been decided differently by different State courts, under precisely the same code of practice. In several of these it has been held that the real party in interest is always the proper plaintiff, while in others it is held that the suit must be brought by the obligor in the bond for the use of the party in interest. Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own code

of practice, we should, in this conflict of authority, *adopt the ruling of the Supreme Court of Montana in the consideration of it.* This assignment of error is, therefore, not well taken."

The transcript of the proceedings in the *District Court* of the Territory are not here, and, in fact, could not properly be here. Attached, however, to the transcript of the proceedings in the Supreme Court of the Territory is what purports to be such transcript of the proceedings in the District Court. It is, however, simply a copy *of a copy* of those proceedings, and cannot be considered here.

Should such record, however, be considered for any purpose, in determining as to the correctness of the decision of the Supreme Court in dismissing the writ of error, then it will clearly show two things:

1st. That the order of the Supreme Court was correct, because there was before that court no proper or legal bill of exceptions, nor any error apparent on the record; and

2d. That delay has been the manifest policy of the plaintiffs in error, from the date when judgment overtook them in the District Court, on November 3d, 1882.

Section 2117 of the Code of Washington, in fixing the different terms of the District Courts of the Territory, provides, among other things, as follows:

"Courts in the Third Judicial District shall be held * * * at Seattle on the second Monday in April and the second Monday in October, and hold four weeks, unless adjourned."

This record tacked on to the record of the proceedings in the Supreme Court, shows conclusively that the bill of exceptions was not allowed or signed, or made a part of the record of the case in the District Court, until *months* subsequent to the statutory *end* of the term at which judg-

ment was entered. The judgment was entered in the District Court Nov. 3d, 1883, (Transcript, 61, 62,) whereas the bill of exceptions was not allowed or signed by the District Judge until March 3d, 1883. There were *eleven different applications* made to the District Judge by plaintiffs in error *for an extension of time to prepare their bill of exceptions, all of which were granted by the Judge*, and several of them made *ex parte*,—not upon written application,—and after the expiration of the time fixed in a former order, and after the expiration of the term of court at which the cause was tried and judgment entered.

Such a document is not a valid bill of exceptions, and cannot become a part of the record.

Powell on Appellate Proceedings, page 121, sec. 12; page 221, sec. 15; page 222, sec. 16; p. 232, sec. 32; p. 238, sec. 40.
Walton *vs.* United States, 9 Wheaton, 650.
Muller *vs.* Ehlers, 91 U. S., 249.
Coughlin *vs.* District of Col., 106 U. S., 7.
Higgins *vs.* Mahoney, 50 Cal., 444.
Saber *vs.* Cooper, 7 Wall., 564.

Point IV.

Should the motion to dismiss be disallowed, par. 2 of Rule 23 of this court should be applied in affirming the judgment of the court below, and damages not exceeding ten per cent., in addition to interest on the amount of the judgment of the District Court, which was in *effect* affirmed by the decision of the Supreme Court, dismissing the writ of error, although no *final judgment* of affirmance, nor, in fact, *any* judgment of affirmance, was rendered by the Supreme Court. (Sec. 1010 U. S. Rev. St.)

This case has already been docketed and dismissed under Rule 9.

The writ of error was made returnable on the first day of the present term. The plaintiffs in error failing to file transcript, the defendant in error on Nov. 14, 1883, moved to docket and dismiss under Rule 9, which motion was allowed. But not until *eighty-two days* had elapsed did the plaintiffs in error come forward with their transcript and file motion for leave to docket the case and file record. This was done February 4th, 1884, and the motion was allowed March 3 and the case docketed and record filed March 6, which, it will be seen, was nearly *five months* subsequent to the return day fixed in the writ of error, which was Oct. 8, 1883.

Surely the ear-marks of a desire to delay are numerous and conspicuous in this record.

The statements of this court (opinions by Chief Justice Waite) in the following cases are applicable to the case under consideration.

In Clark *vs.* Hancock, 94 U. S., 493, this court said in dismissing a writ of error before the return day thereof:

"In the present crowded state of our docket it becomes us to be especially careful that our jurisdiction is not invoked for delay merely, and when the record is presented in such a form that we can, without too great inconvenience, inform ourselves of the questions to be decided, we shall be inclined to receive applications of this kind."

In Whitney *vs.* Cook, 99 U. S., the Chief Justice said in a case wherein a motion to affirm was denied, because there did not appear on the record some color of right to a dismissal:

"Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both accord-

ing to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

In Micas *v.* Williams, 104 U. S., 556, which was a motion to dismiss, with which was united a motion to affirm, Chief Justice Waite said:

"The motion to dismiss is denied, but in looking into the record we are entirely satisfied the writ was taken for delay only. No assignment of errors has been annexed to or returned with the writ as required by section 997 of the Revised Statutes, and every question presented by the bill of exceptions or suggested upon the argument appears to us so frivolous as to make it improper to keep the case here for any further consideration. There was on the record as it stood when these motions were made at least sufficient color of right to a dismissal to justify us in entertaining with it a motion to affirm in accordance with the provisions of Rule 6, par. 5. Motion to affirm granted."

The S. C. Tyson, 105 U. S., 270.

In Evans *v.* Brown at the present term, 109 U. S., 180, the opinion is applicable here, so far as it related to the motion to affirm in that case. The Chief Justice said: "* * But in looking into the record we find the case was manifestly brought here for delay only. All the questions presented are so frivolous as not to need further argument. The motion to affirm is granted; judgment affirmed."

Further argument is deemed unnecessary, except to suggest that if this were a writ of error from the decision of a *Circuit Court* dismissing a suit, the record under par. 2, Rule 32, should have been filed within 60 days subsequent to the adoption of said rule, and would, on motion, under par. 3 of said rule, be advanced on motion and heard under Rule 6; and this should be so in the case

under consideratton in any possible view that may be taken, as the court will observe a reversal of the judgment of the Supreme Court will decide nothing except that the Supreme Court of the Territory shall proceed to hear and determine the case on the record from the District Court; and as another writ of error to this court would most likely follow, if, therefore, this cause is not now either dismissed, affirmed, or advanced, ten years hence, in the present crowded state of the docket, may find it still here; and in the meantime, the judgment will remain unexecuted, and the legal tactics of delay will have accomplished its purpose.

Respectfully submitted.

JOHN H. MITCHELL,
Counsel for Defendant in Error.

111-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1883.

JAMES CRAWFORD AND WILLIAM A HARRINGTON, PARTNERS UNDER THE FIRM NAME OF CRAWFORD & HARRINGTON, AND GEORGE A. MEIGS,

PLAINTIFFS IN ERROR,

vs.

GRANVILLE O. HALLER,

DEFENDANT IN ERROR.

No. 1262.

Reply to the Motions of the Defendant in Error to Dismiss the Writ of Error and to Affirm the Judgment Below.

S. S. BURDETT,

Of Counsel for the Plaintiffs in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS.
1884.

IN THE

Supreme Court of the United States.

October Term, 1883.

JAMES CRAWFORD AND WILLIAM A. HARRINGTON, PARTNERS UNDER THE FIRM NAME OF CRAWFORD AND HARRINGTON, AND GEORGE A. MEIGS,

PLAINTIFFS IN ERROR.

vs.

GRANVILLE O. HALLER,

DEFENDANT IN ERROR.

No. 1262.

Reply to the Motions of the Defendant in Error to dismiss the Writ of Error and to affirm the Judgment below.

The decision from which this writ of error is taken is a final decision within the meaning of section 1911 of the Revised Statutes of the United States, for the following reasons:

A judgment was entered in the district court of the third judicial district of Washington Territory on the third day of November, 1882. (See written transcript, pp. 61, 62.)

The writ of error was dismissed by the supreme court of Washington Territory on the 24th day of July, 1883. (See transcript, p. 189.)

The code of Washington Territory in force at the time of entering the judgment in the district court and the dismissal of the writ of error in the supreme court provided as follows:

"Appeals and writs of error from the district court may be taken to the supreme court at any time within six months from

the rendition of the judgment or order appealed from or complained of, and not afterward." (Code of Washington Territory, section 453.)

The dismissal of this writ of error at the time the decision of the supreme court of Washington Territory was rendered was, since the time for suing out a writ of error had passed, a decision that finally disposed of the case, and left no question of right between the parties open for future adjudication. It was consequently a final decision.

Wabash and Erie Canal Co. v. *Beers*, 1 Black, 54.
De Krafft v. *Barney*, 2 *Id.*, 704.
Atherton et al. v. *Fowler et al.*, 91 U. S., 143.
Bebee et al. v. *Russel*, 19 Howard, 283.
Weston v. *City Council of Charleston*, 2 Peters, 449.

In *Bebee et al.* v. *Russel*, *supra*, the Court says at page 285: "When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."

In *Weston* v. *City Council of Charleston*, *supra*, the constitutional court of South Carolina had reversed an order for prohibition granted by the court of common pleas for the Charleston district, and the writ of error was brought from that decision. The question was raised in this court as to whether that decision was a final judgment, and in passing upon it the Court says, page 464, "We think also that it was a final judgment in the sense in which that term is used in the 25th section of the judicial act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however

deeply they might affect rights protected by the Constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct the judgment. The word 'final' must be understood in the section under consideration, as applying to all judgments and decress which determine the particular cause."

And to the words "final decrees" this Court has always given a liberal construction.

Forgay v. *Conrad*, 6 Howard, 201.

An order dismissing a petition in the nature of an *audita querela* is a final judgment.

New Orleans Railroad v. *Morgan*, 10 Wall., 256.

A final judgment is one that puts an end to the suit.

Bouvier's Dict., title Judgment.

The dismissal of the appeal operated as an affirmance of the judgment in the district court, and is therefore final.

Karth v. *Light*, 15 Cal., 324.
Chamberlin v. *Reed*, 16 *Id.*, 208.
Ellis v. *Hull*, 23 *Id.*, 161.
Lyons v. *Leimback*, 29 *Id.*, 138.
Rowland v. *Keyenhagen*, 24 *Id.*, 52.
McConnel v. *Swailes*, 2 Scammon, (Ill.,) 571.
Sutherland v. *Philips*, 22 Ill., 91.
Harrison v. *Bank of Kentucky*, 3 J. J. Marshall, (Ky.,) 376.
Feemister v. *Anderson*, 6 T. B. Monroe, (Ky.,) 537.
Simpson v. *Prather*, 5 Oregon, 26.
Haner v. *Polk*, 6 Wis., 350.
Hax et al. v. *Leis*, 1 Colorado, 190.

In *Bostwick* v. *Brinkerhoff* (106 U. S., 3) the Court said: "The rule is well settled and of long standing that a judgment or decree to be final * * * must terminate the litigation

between the parties on the merits of the case, so that if there should be an affirmance here the court below would have nothing to do but to execute the judgment or decree it had already rendered."

That the judgment of the supreme court of Washington Territory was a final one terminating the litigation between the parties is clear from the fact that an affirmance of that judgment will leave nothing to be done by the court below but to execute the judgment rendered against the plaintiffs in error.

Section 1911 of the Revised Statutes of the United States provides that writs of error may be taken from the final *decisions* of the supreme court of Washington Territory to the Supreme Court of the United States. By the use of the expression "decisions," Congress undoubtedly intended to cover *every* case where the decision of the court finally disposed of the cause, whether a technical judgment was entered or not.

Revised Statutes of the United States, section 1911.

See also secs. 690, 691.

The supreme court of Washington Territory has decided that this is a final judgment or decision by allowing the writ of error and granting a supersedeas.

See written transcript, pages 189 to 191.

The question as to whether the supreme court of the Territory will, in case the transcript be not filed and the cause docketed in the supreme court 15 days before the first day of the term, dismiss the writ, or on a showing allow it to stand, is not one resting on the discretion of the court, but, on the contrary, the code of Washington Territory provides that an issue shall be made up by written pleadings as to whether the plaintiff in error has or has not any further right to prosecute his writ of error, and upon the issues so made up the court decides the questions of law and fact therein.

Code of Washington, sections 492, 493.

Section 492, above referred to, provides that when an appellant or plaintiff in error has no right or further right to prosecute the appeal or writ of error, the appellee or defendant in error may move to dismiss.

The rules of the supreme court of Washington Territory provide that all motions must be in writing and served by copy upon opposing counsel.

Rule 6 of the supreme court of Washington Territory.

No such service was ever had in this action.

See written transcript.

Section 460 of the code of Washington Territory provides: "The notice of appeal or suit in error must be served at least thirty days, and the cause filed and docketed at least 15 days before the first day of the next term of the supreme court, or the same shall not then be tried unless by consent of parties. If the appeal or writ of error is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term."

Section 461 provides: "If the appellant fails to file a transcript and have the cause docketed, as provided in the preceding section, the appellee or defendant in error may file a certified copy of the judgment or order appealed from, and of the notice served, and, on motion, have the appeal or suit in error dismissed, or the judgment or order appealed from affirmed." This was never done by the defendant in error, and no transcript was ever filed by him or motion served on opposing counsel.

The question decided by the supreme court of Washington Territory was one of jurisdiction, and it cannot be said that the jurisdiction of the court rests in its discretion.

"A failure to annex to or return with a writ of error, an assignment of errors, as required by section 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of par. 4, rule 21, it will ordinarily be enough."

School District of Ackley v. *Hall*, 106 U. S., 428.

Rule 21, par. 2, provides that the brief shall contain an assignment of errors, and, par. 3, that the brief be filed at least three days before the cause is called for argument. The cause has not yet been called, and therefore the writ cannot be dismissed upon that ground.

ARGUMENT ON MOTION TO AFFIRM.

I.

A failure to annex to or return with the writ of error an assignment of errors, as required by section 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of par. 4, rule 21, it will ordinarily be enough.

School District of Ackley v. *Hall*, *supra*.

Rule 21, par. 2, provides that the brief shall contain an assignment of errors, and, par. 3, that the brief be filed at least three days before the cause is called for argument. The cause has not yet been called.

II.

The want of a bill of exceptions affords no reason for dismissing the writ or affirming the judgment. A bill of exceptions is only used to put into the record that which would not appear without.

The S. C. Tryon, 105 U. S., 270.

Here the error complained of is the dismissal of the appeal because the transcript was not filed within 15 days before the first day of the term. The transcript, the time at which it was filed, and all proceedings relative to the dismissal of the writ, appear in the record, and there is nothing to embody in a bill of exceptions.

New Orleans Railroad v. *Morgan*, 10 Wall., 260 & 261.

Rogers v. *Burlington*, 3 Wall., 654.

If any pleadings were filed in the supreme court of the Territory upon the question as to whether the appellant had no further right to prosecute the writ, those pleadings would have been a part of the record, and as the whole record has been properly certified to this court, every fact which is necessary in order to enable this court to properly review the decision of the supreme court of Washington Territory appears upon the record.

III.

The supreme court of Washington Territory was clearly in error in dismissing the appeal. It was the duty of the clerk of the court, and not of the plaintiff in error, to file the transcript. Section 459 of the Code of Washington Territory provides: "An appeal shall not be perfected until the notice thereof has been served upon the adverse party or his attorney of record. Upon payment of his fees, the clerk shall forthwith transmit by mail, express, or messenger, not a party nor the attorney of a party, a transcript of the record in the cause, or so much thereof as the appellant, or plaintiff in error, in writing, in the notice has directed, to which shall be appended copies of the notice of appeal and the supersedeas bond, if any."

All that the plaintiffs in error were bound to do was to pay the clerk his fees, and the clerk is bound to send up the record and is absolutely prohibited from entrusting it to a party or his attorney for that purpose.

Section 460 of the code provides that if the cause be not filed and docketed at least fifteen days before the first day of the next term of the supreme court, the same shall not be tried unless by consent of parties. The obvious intent of this section is that if the clerk fails to have the transcript filed and the case docketed in time, that the opposite party shall not be forced to trial at that term.

Section 461 of the code of Washington Territory provides: "If the appellant fails to file a transcript and have the cause docketed, as provided in the preceding section, the appellee or

defendant in error may file a certified copy of the judgment or order appealed from and of the notice served, and, on motion, have the appeal or suit in error dismissed, or the judgment or order appealed from affirmed, provided that when the failure to file the transcript is owing to the fault or omission of the clerk of either the appellate or inferior court, or other circumstance over which the appellant has no control, the court shall not dismiss the cause, but shall fix such time for hearing the same as will insure a fair trial." This section evidently refers to a case where the plaintiff in error has not paid the fee of the clerk and, therefore, has failed to render it obligatory upon him to send up the record, and not to a case where the record actually has been sent up, or where the failure to send is not the fault of the parties. It clearly refers only to a case where no transcript is on file.

Section 462 of the code of Washington provides: "If the transcript has been sent up, but the appellant or plaintiff in error does not file the same when the same should be filed, as herein provided, the appellee or defendant in error may file the same, and may, on motion, have the appeal dismissed or judgment affirmed, as the court from the circumstances of the case shall determine."

This section embraces all cases where the clerk has sent up the transcript but the appellant has not paid the fees of the clerk of the supreme court for docketing the case. A careful reading of this section will show that the statute never contemplated that the parties should have any power over the record further than by paying the fees of the officers whose duty it is to transmit and receive it.

The latter part of section 461 specially provides that " when the failure to file is owing to the fault or omission of the clerk of either the inferior or appellate court, or *other* circumstance over which the plaintiff has no control, the court will not dismiss the cause."

The record in this case (see written transcript, p. 183) shows that the fees were all duly paid by plaintiffs in error in ample

time to have the transcript made up and certified to the supreme court.

The date of the certificate of the clerk of the district court (see written transcript, p. 183) shows that he did not complete the transcript until after the expiration of the time within which it should have been filed, and therefore it was impossible for the plaintiffs in error to file it within that time, even if they had any power over the records, and as this fact appeared in the record no showing on the part of the plaintiffs in error was necessary. They could not take the record up themselves, and they had the right to suppose that the clerk would do his duty as they had done theirs.

IV.

There is no evidence in the record that this writ is taken for delay. The failure to file the transcript in this court, as appears by affidavits on file, was not owing to fault on the part of plaintiffs in error. Neither can the question presented upon this writ of error be said to be frivolous. They have been injuriously affected by the judgment of the supreme court of the Territory, and to secure redress have sued out this writ of error. The defendant in error is abundantly secured, and the rate of interest allowed upon the judgment, ten per cent. per annum, is so large that the plaintiffs in error can certainly have no object in mere delay.

They contend that the construction given to the sections of the code heretofore cited by them are in accordance with reason and justice, and that they are entitled to a judgment of this Court upon that construction.

Counsel on the other side is in error in asserting that the transcript of the proceedings in the district court of the Territory is not here, and that there was no proper or legal bill of exceptions before the supreme court of the Territory. The cases cited by him to sustain his position, that the bill of exceptions is not a valid one, have no application. On the contrary the question as to when a bill of exceptions may be signed by

a judge, and may thus become a part of the record, is settled in *Stanton* et al. v *Embry Administrator*, 93 U. S. 548.

As was held in *Dredge* v. *Forsyth*, (2 Black, 563,) citing *United States* v. *Brietling*, (20 How., 254,) the time within which a bill of exceptions may be "drawn out and presented to the court must depend on the practice of the court and the judicial discretion of the presiding justice."

The bill of exceptions to the ruling of the district court is full and elaborate, and the whole proceedings before that court, as well as before the supreme court, are embraced by the written transcript.

It is submitted with great confidence that the motions of the defendant in error should be denied and dismissed.

S. S. BURDETT,
of Counsel for the Plaintiffs in Error.